Supreme Court, U.S.
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No. 10-249

In The

Supreme Court of the United States

DAVID CWIK, as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz, individually and on behalf of a class of all others similarly situated, and ANITA WHITE, individually and on behalf of a class of all others similarly situated,

Petitioners,

v.

ALEXI GIANNOULIAS, Treasurer of the State of Illinois, and JOSHUA JOYCE, Director Unclaimed Property Division of the Office of Treasurer of the State of Illinois,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

ARTHUR T. SUSMAN*
SUSMAN HEFFNER & HURST LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466
asusman@shhllp.com

One of the Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under the Illinois Uniform Disposition of Unclaimed Property Act, the State of Illinois takes custody of private property it has defined as "unclaimed" – but which is not "abandoned" according to the Illinois Supreme Court – invests the property and retains the interest earned, and otherwise uses the property to fund state obligations without paying just compensation to the owner. Does the Act therefore constitute an unconstitutional taking without just compensation?

2. The Due Process Clause prohibits a state from eliminating a fundamental property right without procedural due process protections. The Illinois Uniform Disposition of Unclaimed Property Act extinguishes a fundamental property right – the right that "interest follows principal" – automatically and without judicial oversight. Does the Act therefore work a procedural due process violation?

3. The Due Process Clause prohibits a state from ordering the forfeiture of private property by legislative *ipse dixit*. The Illinois Uniform Disposition of Unclaimed Property Act causes the forfeiture of a fundamental property right – the right that "interest follows principal" – with no constitutionally appropriate state objective. Does the Act therefore violate the Due Process rights of owners of unclaimed property?

PARTIES

Petitioners David Cwik and Anita White are individuals suing on behalf of themselves and a class of similarly situated Illinois unclaimed property owners. Petitioners were the Plaintiffs and the Appellants in the state court proceedings.

Respondents Alexi Giannoulias and Joshua Joyce are, respectively, the Treasurer of the State of Illinois and the Director of the Unclaimed Property Division of the Office of the Treasurer of Illinois.

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PETITION FOR A WRIT OF CERTIORARI

David Cwik and Anita White petition for a writ of certiorari to review the opinion and judgment of the Illinois Supreme Court issued on May 20, 2010. The Illinois court held that Defendants' use of private property held in state custody pursuant to the Illinois Uniform Disposition of Unclaimed Property Act as unclaimed property and invested or otherwise used by the state for public purposes is not a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution and does not violate Due Process.

OPINIONS BELOW

The orders of the Circuit Court of Cook County, Illinois, granting Plaintiffs' Motion for Class Certification and certifying questions for appeal are reprinted in the Appendix. (Pet. App. 20-25.) The opinion of the Illinois Appellate Court answering the certified questions and holding that, although there may have been a "taking," Plaintiffs were not entitled to any "just compensation" is reported at 905 N.E.2d 300. The opinion of the Illinois Supreme Court affirming on other grounds, holding that the failure to pay compensation to unclaimed property owners is not a "taking" is reported at ___ N.E.2d ___, 237 Ill.2d 409 (Ill. May 20, 2010), and is reprinted in the Appendix. (Pet. App. 1-19.)

JURISDICTION

The Illinois Supreme Court affirmed the decision of the Illinois Appellate Court on May 20, 2010. (Pet. App. 19.) This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth Amendment to the United States Constitution state:

> [N]or shall [any person] be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Fourteenth Amendment to the United States Constitution state:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

The relevant portion of Section 15 of the Illinois Uniform Disposition of Unclaimed Property Act states:

> When property is paid or delivered to the State Treasurer under this Act, the owner is not entitled to receive income or other

> increments accruing thereafter, except that income accruing on unliquidated stock and mutual funds after July 1, 1993, may be paid to the owner.

765 Ill. Comp. Stat. 1025/15.

The relevant portion of Section 20 of the Illinois Uniform Disposition of Unclaimed Property Act states:

> If the claim is allowed, and after deducting an amount not to exceed $20 to cover the cost of notice publication and related clerical expenses, the State Treasurer shall make payment forthwith.

765 Ill. Comp. Stat. 1025/20(b).

STATEMENT OF THE CASE

Plaintiffs ask the Court to review the decision of the Illinois Supreme Court holding that the State of Illinois may invest and otherwise use for state purposes private property it has statutorily defined as "unclaimed" – but which the Illinois Supreme Court has held is not "abandoned" – without paying just compensation to the owners of the unclaimed property and without due process protections.

A. Statement of Facts

Every state and the District of Columbia has an unclaimed property program, collectively holding

more than $32 billion in so-called "unclaimed property."[1] Under every program, there is a statutory requirement that "holders" of property, principally money, that has become "unclaimed" under the statutory definition (for example, banks) must transfer that property to the state. The state then invests it and earns interest or otherwise uses the property to fund state obligations. *See, e.g.*, 765 Ill. Comp. Stat. 1025/18. For example, if the balance in a savings account is not accessed for a withdrawal or deposit for a statutorily-prescribed period (in Illinois, five years, 765 Ill. Comp. Stat. 1025/2), the statute typically requires the bank to deliver the account to the state.

Under nearly every statute, the state's role is, ostensibly, purely custodial, making it responsible for the "safekeeping" of the property, *e.g.*, 765 Ill. Comp. Stat. 1025/14, and allowing the rightful owner to claim the property at any time without limitation, *e.g.*, 765 Ill. Comp. Stat. 1025/15. Under Illinois law, unclaimed property remains private property at all times; it is not considered "abandoned," and the state never takes beneficial ownership of it. *Canel v. Topinka*, 818 N.E.2d 311, 325 (Ill. 2004). Contrary to the Illinois Supreme Court's suggestion in this case, these statutes have no punitive component, and they are not intended to punish people for "neglecting" their

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[1] Pet. App. 48, Website of National Association of Unclaimed Property Administrators *at* http://www.unclaimed.org/what/.

property or for leaving their property (again, typically money) in one place. (Pet. App. 31-32, ¶¶ 14-15.)

As a practical matter, these programs are an enormous financial boon to the states. In Illinois, for example, historically, no more than 20% of unclaimed property is ever claimed. (Pet. App. 37-38, ¶ 27.) The remainder stays in state custody forever, and the state invests and reinvests it in perpetuity.

In four of the 51 jurisdictions, the government pays interest to all unclaimed property owners who claim their property to compensate them for the state's use of it while in custody.[2] In 19 jurisdictions, the government pays interest only under certain circumstances, typically for a limited period of time on property that was interest-bearing when it was delivered to the state.[3] In 28 jurisdictions, however, the government pays no compensation whatsoever to any claimants for any of the time the property is put

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[2] Mass. Gen. Laws Ann. ch. 200A § 10(e); Miss. Code Ann. § 89-12-39(3); N.J. Stat. Ann. § 46:30B-79; W. Va. Code § 36-8-11 (interest paid for only 3 years).

[3] Alaska Stat. § 34.45.380(d); Ariz. Rev. Stat. Ann. § 44-311; Colo. Rev. Stat. Ann. § 38-13-117(3)(a); Conn. Gen. Stat. Ann. § 3-70(e); Idaho Code Ann. § 14-524; Kan. Stat. Ann. § 58-3957; Ky. Rev. Stat. Ann. § 393.130; La. Rev. Stat. Ann. § 9:167; Me. Rev. Stat. tit. 33 § 1962; Mich. Comp. Laws Ann. § 567.245; Mo. Ann. Stat. § 447.565.2; N.M. Stat. Ann. § 7-8A-11; N.Y. Aband. Prop. Law § 1405; R.I. Gen. Laws § 33-21.1-24; S.C. Code Ann. § 27-18-250; Tenn. Code Ann. § 66-29-117; Va. Code Ann. § 55-210.21; Wash. Rev. Code Ann. § 63.29.240(3); Wis. Stat. Ann. § 177.24(3)(a).

to public use.[4] The Illinois statute at issue in this case, 765 Ill. Comp. Stat. 1025/15, is one of those that does not provide for the payment of interest under any circumstances, and in Illinois no interest is ever paid. Plaintiffs in this case challenged Illinois' failure to compensate unclaimed property owners as an unconstitutional taking of private property without payment of just compensation and without due process.

Plaintiff Cwik is the administrator of an estate. (Pet. App. 28-29, ¶ 3.) In or about December 1995, approximately $45,555 belonging to the estate was deposited with Defendants after it fell within the Illinois statute's definition of "unclaimed" property. (*Id.* 39, ¶ 31.) In 2000, having approved Mr. Cwik's claim on behalf of the estate for the return of the property, Defendants returned the principal amount, but paid Mr. Cwik no compensation for the state's use

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[4] Ala. Code § 35-12-83; Ark. Code Ann. § 18-28-215; Cal. Civ. Proc. Code § 1540(c); D.C. Code § 41-125; Del. Code Ann. tit. 12 § 1145; Fla. Stat. Ann. § 717.124; Ga. Code Ann. § 44-12-220; Haw. Rev. Stat. § 523A-15; 765 Ill. Comp. Stat. 1025/15; Ind. Code Ann. § 32-9-1.5-36(c); Iowa Code Ann. § 556.15; Md. Code Ann. § 17-219; Minn. Stat. Ann. § 345.45; Mont. Code Ann. § 70-9-815(3); N.C. Gen. Stat. § 116B-64; N.D. Cent. Code § 47-30.1-24; Neb. Rev. Stat. Ann. § 69-1314; Nev. Rev. Stat. § 120A.640(3); N.H. Rev. Stat. Ann. § 471-C:26(III); Ohio Rev. Code Ann. § 169.08; Okla. Stat. Ann. tit. 60, § 674; Or. Rev. Stat. § 98.372; 72 Pa. Stat. Ann. § 1301.17(d); S.D. Codified Laws § 43-41B-25; Tex. Prop. Code Ann. § 71.302; Utah Code Ann. § 67-4a-401; Vt. Stat. Ann. tit. 27 § 1251; Wyo. Stat. Ann. § 34-24-122.

of the property during the nearly five years it was held in custody and used for state purposes. (*Id.*)

Ms. White is the sole heir to her father. (*Id.* 38, ¶ 28.) When he died in 1988, Ms. White became the owner of his shares of the Atlantic Richfield Company. (*Id.*) In 1993, that company delivered $280.50 in cash dividends on that stock to Defendants as unclaimed property. (*Id.*) On or about November 16, 2004, having approved Ms. White's claim, Defendants returned the $280.50 to her, but, as with Petitioner Cwik, paid her no compensation for the state's use of the property for the previous eleven years. (*Id.* ¶ 29.)

B. Proceedings in the Circuit Court of Cook County, Illinois.

Plaintiffs filed suit on behalf of the following Class, which was certified by the Circuit Court of Cook County, Illinois, on August 30, 2007:

> All persons or entities whose property has been taken into custody by the State of Illinois pursuant to the Illinois Uniform Disposition of Unclaimed Property Act (or its predecessor acts) and which has earned or will earn interest or other accruals (other than dividends) while in the custody of the State, which interest or other accruals have been or will be used for the purposes of funding state programs and operations without compensation being paid to the person or

> entity whose property was or will be used to earn such interest or accruals.

(Pet. App. 23-24.)[5]

After denying Defendants' Motion to Dismiss and certifying the Class, the Circuit Court identified two questions for interlocutory appeal:

> Whether the retention for state purposes of the interest earned on property held pursuant to the Illinois Uniform Disposition of Unclaimed Property Act during the time it was in possession of the State Treasurer's Office and/or the State's Retirement Systems is a taking for which just compensation is due under the Fifth and Fourteenth Amendments to the United States Constitution or Article II [*sic*], § 15, of the Illinois Constitution?
>
> If so, whether just compensation should be measured by the interest earned by the State on the property taken.

(Pet. App. 20-21.)

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[5] The Class definition excludes "dividends" because they were the subject of *Canel v. Topinka*, 818 N.E.2d 311, 325 (Ill. 2004), a separate case in which the Illinois Supreme Court held that the state's retention of dividends earned on securities held as unclaimed property constitutes a taking.

C. The Illinois Appellate Court Decision

The Illinois Appellate Court accepted the certified questions and issued its decision in *Cwik v. Topinka*, 905 N.E.2d 300, 308 (1st Dist. 2009), holding that, although "the owner still retained ownership of the property," *id.* at 308, and although "the retention of interest may be a 'taking,'" *id.* at 309, Plaintiffs were not entitled to any just compensation because they "*failed to plead* that they were receiving interest or expected to receive interest on the funds remitted to the State under the Act," *id.* (emphasis added). Plaintiffs appealed to the Illinois Supreme Court.

D. The Illinois Supreme Court Decision

On May 20, 2010, the Illinois Supreme Court affirmed the Appellate Court but on grounds other than those stated by the Appellate Court. *Cwik v. Giannoulias*, ___ N.E.2d ___, 237 Ill.2d 409 (Ill. May 20, 2010). The Illinois Supreme Court reasoned – in what Plaintiffs contend was an unwarranted extension of existing law – that there was no "taking" of private property in this case because, under *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), a state may "divest[] a neglectful owner of *all* rights in certain property absent the performance of specified activities evincing a continued and possessory interest in the property over the prescribed statutory period" and that, therefore, a state may "take the *less* drastic measure of enacting a statute that operates to divest

those owners of only certain incidents of ownership," such as the right to interest on principal. (Pet. App. 12-13.)

REASONS TO GRANT THE WRIT OF CERTIORARI

State and federal courts across the nation are dealing with challenges to "no-interest" unclaimed property statutes on the grounds that they violate the Takings Clause by allowing states to invest and otherwise use private property for state purposes without paying just compensation to the owners. The Ohio Supreme Court, for example, recently struck down that state's no-interest statute as a taking of private property without just compensation. *Sogg v. Zurz*, 905 N.E.2d 187, 191-92 (Ohio 2009). Other courts have upheld such statutes. (*See* Section I, below.) This Court should issue a writ of certiorari to resolve these issues.

The importance of the constitutional issue at hand is underscored by the conflict between no-interest statutes and this Court's holdings in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998), and *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003). Those cases establish that the fundamental right that "interest follows principal" cannot be extinguished by the state without just compensation. The Illinois Supreme Court's decision to disregard

that right itself constitutes a prohibited governmental taking. *See Stop the Beach Renourishment, Inc. v. Fl. Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2601-02 (June 17, 2010).

This case is also important because the sole basis for the Illinois Supreme Court's decision was its conclusion that, under this Court's opinion in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), it would be constitutional for a state to divest its citizens of *all* their rights in certain property merely by statutorily defining it as "unclaimed" or "abandoned," without regard to whether there is a legitimate state purpose in so defining the property. Allowing that precedent to stand would give the states license to take virtually any private property for public use without compensation and without procedural due process. The Court should issue a writ of certiorari to correct this misstatement of federal constitutional law and prevent this precedent from taking root in our jurisprudence.

I. The Court Should Conclusively Decide Whether States Must Pay Compensation to Unclaimed Property Owners.

Over the past decade, various state and federal courts have ruled on the constitutionality of unclaimed property statutes that fail to pay compensation to the owners. The Supreme Court of Ohio struck down the section of the Ohio Unclaimed Funds Act that stated, "[i]nterest is not payable to claimants of unclaimed funds held by the state" as

an unconstitutional taking of private property without just compensation. *Sogg v. Zurz*, 905 N.E.2d 187, 191-92 (Ohio 2009). The court ruled that the no-interest provision was a "breathtakingly bold" legislative declaration that "strikes at the core of the concept of private property" because, "at a stroke, the General Assembly severed the link between the owner of an asset and the income produced by that asset." *Id.* at 190.[6]

A number of other courts, however, have upheld no-interest provisions by extending *Texaco* as the Illinois Supreme Court did in this case. *See Simon v. Weissman*, 301 Fed. Appx. 107, 114 (3d Cir. Dec. 1, 2008); *Turnacliff v. Westley*, 546 F.3d 1113, 1118-20 (9th Cir. 2008); *Smolow v. Hafer*, 959 A.2d 298, 303-04 (Pa. 2005); *Morris v. Chiang*, 163 Cal. App. 4th 753, 759-60 (Cal. App. 2008); *Rowlette v. North Carolina*, 656 S.E.2d 619, 625-26 (N.C. App. 2008); *Hooks v. Kennedy*, 961 So.2d 425, 431-32 (La.Ct. App. 2007); *Clark v. Strayhorn*, 184 S.W.3d 906, 914 (Tex. App. 2006); *Smyth v. Carter*, 845 N.E.2d 219, 224 (Ind. App. 2006).

Considering the tens of billions of dollars held as unclaimed property across the nation and the

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[6] Although the Ohio court limited its analysis to the Takings Clause of the Ohio Constitution, *Sogg*, 905 N.E.2d at 191, the language of that provision is nearly identical to the Fifth Amendment. Ohio Const. art. I, § 19 (allowing state to take "private property" for "public welfare" only if "compensation therfor shall first be made in money").

millions of affected unclaimed property owners, this Court should issue a writ of certiorari to decide this issue of national importance.

II. The Opinion of the Illinois Supreme Court Conflicts with the Decisions of this Court.

A. The Decision Contradicts *Webb's*, *Phillips*, and *Brown*.

The fundamental tenet of property law that "interest follows principal" was "established under English common law since at least the mid-1700s," and it "has become firmly embedded in the common law of the various States." *Phillips*, 524 U.S. 156 at 165. Under Illinois law, for example, it was an unconstitutional taking for a county treasurer to retain interest earned on money held pending the appeal of a condemnation award. *Morton Grove Park Dist. v. Am. Nat'l Bank & Trust Co.*, 399 N.E.2d 1295, 1299 (Ill. 1980). Those earnings were "a mere incident of ownership of the fund itself," and the Takings Clause applied to those earnings "in the same manner, and with the same force, as it applies to the principal." *Id.* Similarly, Illinois law recognizes that, "[i]n our society, the use of money is worth money." *Milligan v. Gorman*, 810 N.E.2d 537, 541 (Ill. App. Ct. 2004) (quoting *Hass v. Cravatta*, 389 N.E.2d 226, 231 (Ill. App. Ct. 1979)).

This Court has applied the interest-follows-principal rule in substantially the same way. For

example, in *Webb's*, money was deposited with the clerk of the court in an interpleader action. 449 U.S. at 156-57. The clerk, pursuant to state law, invested the funds and earned interest while holding the principal in custody. *Id.* at 158. Upon returning the principal to the owner after the interpleader was finished, the clerk, again pursuant to statute, deducted a 5% administrative fee and, in addition, retained the accrued interest. *Id.*

This Court held that the government's retention of the accrued interest was "a forced contribution to general governmental revenues" and was therefore unconstitutional:

> Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> * * *
>
> To put it another way, a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant

> to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. at 164; *see also Phillips*, 524 U.S. at 172 (holding that interest earned on private funds in Interest On Lawyers Trust Account pursuant to state statute was itself private property); *Brown*, 538 U.S. at 235-40 (holding that statute that commanded interest earned on a Washington IOLTA account be used to fund indigent legal services worked a taking under the Fifth and Fourteenth Amendments).[7]

In this case, the Illinois statute that allows Defendants to invest and otherwise use unclaimed property for state purposes without paying just compensation accomplishes exactly what this Court rejected in *Webb's*, *Phillips*, and *Brown*. In effect, the statute automatically transforms unclaimed property into "public money," to be used by the state until

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[7] In *Brown*, the Court upheld the Washington IOLTA statute because no just compensation was due where, by the express terms of the statute, funds properly deposited in an IOLTA account could never earn "net interest," that is, interest in excess of the expense of paying it to the owner. *Brown*, 538 U.S. at 237-40. Here, there is no requirement in the Illinois Act that unclaimed property be used for state purposes only if it is incapable of earning net interest. All unclaimed property, regardless of the amount or how long it is held, is conscripted into state use. Moreover, the Illinois Act, like the statute in *Webb's*, allows the state to recover its administrative costs. *See* 765 Ill. Comp. Stat. 1025/20(b). In any event, the amount of just compensation due was not at issue in the Illinois Supreme Court's decision.

returned to the owners without just compensation. *Webb's*, 449 U.S. at 164. The statute "appropriate[s] for the [state] the value of the use of the fund," and "transform[s] private property into public property without compensation. . . ." *Id.*

The Illinois Supreme Court's decision itself constitutes an unconstitutional taking. As the Court recently recognized in *Stop the Beach Renourishment, Inc. v. Fl. Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2601-02 (June 17, 2010), a judicial decision can constitute a taking just as easily as an act by the executive or legislative branches. The question is not which "particular state *actor*" is implicated, but whether the government action "declares that what was once an established right of private property no longer exists. . . ." *Id.* at 2602. "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* at 2601.

This Court should issue a writ of certiorari to address and correct the Illinois Supreme Court's failure to follow the Constitution, and give effect to the Court's repeated pronouncements that private property cannot be conscripted into the government's use without payment of compensation.

B. The Decision's Unwarranted Extension of *Texaco* Violates Due Process.

The Illinois Supreme Court's only stated reason for disregarding the interest-follows-principal rule

and allowing the state to make use of private property without just compensation was its conclusion that, under *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), a state can "divest[ ] a neglectful owner of *all* rights in certain property absent the performance of specified activities evincing a continued and possessory interest in the property over the prescribed statutory period. . . ." (Pet. App. 12.) The court held that it "logically follows" that, if a state can take *all* property rights, it can also "take the *less* drastic measure of enacting a statute that operates to divest those owners of only certain incidents of ownership," such as the right to interest on principal. (*Id.*) That reasoning conflicts with *Texaco*.

First, *Texaco* does not support the Illinois court's decision because, in that case, the government did not take private property for public use. *Texaco*, 454 U.S. at 519. Rather, the statute at issue merely allocated the ownership of unexploited mineral interests between private parties, in effect regulating them by providing that after a certain period particular undeveloped subsurface interests would revert to the surface owner. *Id.*; *see also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp. 2d 206 (D.R.I. 2002), *aff'd*, 337 F.3d 87 (1st Cir. 2003) (distinguishing *Texaco* on grounds that it involved transfer of property rights between private individuals, while in *Pascoag* the state assumed title to the property at issue).

Here, in contrast, the state takes for its own use and benefit a property right previously held by the

owner of the property – the right to interest on principal or compensation for the use of that principal. The Court should accept review of this case to determine the legality of the Illinois statute under *Texaco* and clarify that *Texaco* approves only regulation of property interests among private parties and is not a license for cash-strapped states to encroach upon private property rights.[8]

Second, under the Illinois court's holding, the Illinois statute results in a due process violation. The statute provides no procedural due process before (or after) depriving unclaimed property owners of the right to the value of the use of their property. That property right is forfeited automatically and irrevocably by operation of the statute. Owners are afforded no opportunity to be heard, and there is no judicial oversight of the transfer of the property right to the state. The statute at issue in *Texaco*, by contrast, provided *full* procedural due process protections. *Texaco*, 454 U.S. at 534 ("It is undisputed that, before

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[8] *Texaco* cannot have been intended to have as broad a reach as the Illinois court gave it. The Court decided *Texaco* two years after *Webb's*, but *Texaco* does not mention (let alone overrule) *Webb's*. Nor is *Texaco* discussed in the later *Phillips* and *Brown* decisions. If the Court had intended *Texaco* to stand for the proposition that a state can simply escheat private property by legislative *ipse dixit* without procedural due process, it would have overruled or at least distinguished *Webb's*, and it certainly would have discussed *Texaco* in *Phillips* and *Brown*. The Court must not have intended *Texaco* to authorize governments to seize property rights in the manner contemplated by the Illinois court.

judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause – including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard – must be provided."); *see also Atkins v. Parker*, 472 U.S. 115, 144 n.21 (1985) (Brennan, J., dissenting) ("*Texaco* thus plainly acknowledged that due process protections were required to prevent erroneous application of the statute.").

Also, due process was satisfied in *Texaco*, in part, because there was a valid police-power justification for the regulation. The Court reasoned that "[t]he requirement that a mineral owner file a public statement of claim" furthered "clear benefits to the State" by ensuring that scarce mineral deposits would be developed for the benefit of all citizens. *Texaco*, 454 U.S. at 529. Thus, a state may "condition" the retention of property rights on the "performance of certain affirmative duties" only where it is "designed to further legitimate legislative objectives. . . ." *United States v. Locke*, 471 U.S. 84, 104 (1985).

Here, there is no legitimate police-power justification for confiscating the right to interest on unclaimed property. Raising revenue, standing alone, may be legitimate if accomplished "by taxation," but it is not a legitimate exercise of the state's police power to raise revenue by interfering with fundamental rights. *See Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898, 913 (9th Cir. 2009). Therefore,

there is no "essential nexus" between the no-interest provision of the Illinois statute and whatever legitimate state purposes the statute may serve, such as protecting unclaimed property owners or holders. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). As far as the state's interest in recovering its expenses in operating the unclaimed property program, the state is reimbursed for any costs it incurs for "notice publication and related clerical expenses" by the $20 fee on unclaimed property claims imposed by 765 Ill. Comp. Stat. 1025/20(b). Moreover, unlike the undeveloped mineral deposits in *Texaco*, private property that later becomes "unclaimed" does not sit unused. The banks, insurance companies, utilities, and other holders invest it themselves. The only difference after the state takes custody is that the state invests it or otherwise uses it rather than the holders. That economic reality is why Illinois requires holders to pay interest when they fail to timely deliver unclaimed property. 765 Ill. Comp. Stat. 1025/25.5 (charging delinquent holders the greater of "1% per month or an annualized rate that is 3 percentage points above the prime rate").

The due process violations inherent in the Illinois court's approach are highlighted by the infirmities found in several early unclaimed property statutes that operated in precisely the manner the Illinois court held would be allowable under *Texaco* (*i.e.*, statutes that caused an automatic forfeiture of *all* ownership rights in unclaimed property after a prescribed period of time). (Pet. App. 12-13.) All were

held unconstitutional for failure to provide procedural due process. *See Am. Loan & Trust Co. v. Grand River Co.*, 159 F. 775, 781-82 (W.D. Ky. 1908) (striking down federal unclaimed property statute "because [it] transfer[s] the title to the money from the true owners to the United States without any process of law or any compensation"); *Clovis Nat'l Bank v. Calloway*, 364 P.2d 748 (N.M. 1961); *State v. Otis Elevator Co.*, 95 A.2d 715 (N.J. 1953); *State v. Phoenix Savs. Bank & Trust Co.*, 132 P.2d 637 (Ariz. 1942); *State v. Sec. Sav. Bank*, 199 P. 791 (Cal. 1921), *aff'd*, *Sec. Sav. Bank v. State*, 263 U.S. 282 (1923); *State v. Sav. Union Bank & Trust Co.*, 199 P. 26 (Cal. 1921).

Third, the Illinois court's decision is based on a presumption of "neglect[ ]" or a lack of "vigilance" on behalf of all unclaimed property owners. (Pet. App. 13, 17.) That presumption is unwarranted. The Illinois Act makes no mention of "negligence," nor is an owner's negligence a prerequisite before a holder is required to deliver unclaimed property to the state. Plaintiffs in this case, for example, inherited property that fell within the statutory definition of "unclaimed" property after one of their relatives died, presumably, without Plaintiffs' knowledge (otherwise, they would have promptly collected their money). (Pet. App. 38, ¶¶ 28, 30.) That does not make them (or their decedents) negligent.

Justice Saylor of the Pennsylvania Supreme Court recognized the problem with applying *Texaco* in the manner Illinois proposes in his dissent from an opinion upholding Pennsylvania's no-interest

unclaimed property law. *Smolow v. Hafer*, 959 A.2d 298, 305 (Pa. 2005) (Saylor, J., dissenting). He noted that the majority decision, like the Illinois Supreme Court's Decision in this case, "rests integrally upon a concept of presumed negligence on the part of property owners," which has no empirical support. As he wrote, the majority failed to "pause to discuss the justification for such a presumption or the availability (or non-availability) of due process protections available under the statute to those subject to its operation who are not, in fact, negligent." *Id.* He noted, for example, that there may be a "continuum" of situations "in which an owner may not have the present ability to monitor his or her property, such as circumstances of medical incapacity or inheritance of unknown assets." *Id.*; *see also Taylor v. Westley*, 402 F.3d 924, 927-28 (9th Cir. 2005) (lawsuit in which holder mistakenly delivered plaintiffs' property to state as "unclaimed" through no fault of plaintiffs).

The Court should review this case to correct the Illinois Supreme Court's misapplication of *Texaco* to allow states to divest unclaimed property owners of their property rights without due process based on an unwarranted presumption of negligence.

CONCLUSION

For the reasons above, Petitioners request the Court grant a writ of certiorari to review the decision and judgment of the Illinois Supreme Court.

Respectfully submitted,

ARTHUR T. SUSMAN*
GLENN L. HARA
SUSMAN HEFFNER & HURST LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466

JOHN R. WYLIE
CHARLES R. WATKINS
DONALDSON GUIN LLC
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 878-8391

WILLIAM J. HARTE
WILLIAM J. HARTE LTD.
135 S. LaSalle Street, Suite 2200
Chicago, Illinois 60603
(312) 726-5015

**Counsel of Record*

Dated: August 18, 2010

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NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Illinois.
David CWIK, Successor Independent Adm'r of the Estate of Genowefa Bogdanowicz, et al., Appellants,
v.
Alexi GIANNOULIAS, Treasurer of the State of Illinois, et al., Appellees.
No. 108313.

May 20, 2010.

OPINION

Justice KARMEIER delivered the judgment of the court, with opinion.

In this appeal, plaintiffs challenge the state's retention of interest earned on property held by the state pursuant to section 15 of the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/15 (West 2004)). In proceedings below, the circuit court of Cook County denied the defendants' motion to dismiss plaintiffs' amended complaint, which sought recovery of interest on plaintiff's property (money) previously held by the state under the Act; however, the circuit court certified dispositive questions to the appellate court pursuant to Supreme Court Rule 308 (155 Ill.2d R. 308). In the course of answering those

questions, the appellate court ultimately determined that the retention of interest by the state "may" be a "taking" under section 15 of the Illinois Constitution of 1970 (Ill. Const.1970, art. I, § 15) and the fifth and fourteenth amendments to the United States Constitution (U.S. Const., amends. V, XIV), but given the allegations in this case, the court concluded it is not a taking for which just compensation is due. 389 Ill.App.3d 21, 328 Ill.Dec. 766, 905 N.E.2d 300. This appeal followed. 210 Ill.2d Rs. 315, 317. For the reasons set forth hereafter, we affirm the judgment of the appellate court.

STATUTE INVOLVED

The Uniform Disposition of Unclaimed Property Act (the Act) (765 ILCS 1025/1 *et seq.* (West 2004)) was enacted by our General Assembly in 1961. The Act creates a "presumption of abandonment" pertaining to various forms of neglected or unclaimed property held for the owners by, *inter alia,* financial organizations (765 ILCS 1025/2 (West 2004)), business associations (765 ILCS 1025/2a (West 2004)), insurance companies (765 ILCS 1025/3 (West 2004)), utilities (765 ILCS 1025/4 (West 2004)), and governmental entities or authorities (765 ILCS 1025/8, 8.1 (West 2004)), where the owners have failed to claim or otherwise indicate an interest in the property through statutorily specified acts for a period of time generally ranging from five to seven years, depending upon the applicable provision.

Pursuant to section 11(a) of the Act ((765 ILCS 1025/11(a) (West 2004))), a holder of "funds or other property, tangible or intangible, presumed abandoned under this Act, shall report and remit all abandoned property specified in the report to the State Treasurer." Section 11(b) specifies information that must be provided to the Treasurer, information that might help to identify or locate the owner and verify that the property does fall under the statutory presumption of abandonment. See 765 ILCS 1025/11(b) (West 2004). With that information, the state is required, by section 12 of the Act (765 ILCS 1025/12 (West 2004)), to attempt to notify the owner by publishing a notice in a newspaper of general circulation. The notice must list the last known addresses of persons listed in the report, describe the property in question, provide contact information concerning the holder of the property, and include a "statement that the abandoned property has been placed in the custody of the State Treasurer to whom all further claims must thereafter be directed." 765 ILCS 1025/12 (West 2004).

The Act provides that "[e]very person who has filed a report as provided by Section 11 shall deliver to the State Treasurer all abandoned property specified in the annual report on the same date that the annual report is filed." 765 ILCS 1025/13 (West 2004). "Upon the payment or delivery of abandoned property to the State Treasurer, the state shall assume custody and shall be responsible for the safekeeping thereof."

765 ILCS 1025/14 (West 2004). Significantly, for purposes of this appeal, the Act states:

> "When property is paid or delivered to the State Treasurer under this Act, the owner is not entitled to receive income or other increments accruing thereafter, except that income accruing on unliquidated stock and mutual funds after July 1, 1993, may be paid to the owner." 765 ILCS 1025/15 (West 2004).

As to disposition of the "abandoned property," the Act, in its applicable 2004 form, provided:

> "All abandoned property, other than money and that property exempted by paragraphs (1), (2), and (3) of this subsection, delivered to the State Treasurer under this Act shall be sold within a reasonable time to the highest bidder at public sale * * * ." 765 ILCS 1025/17(a) (West 2004).

Section 18 of the Act stated that the "Treasurer shall retain all funds received under this Act, including the proceeds from the sale of abandoned property under section 17, in a trust fund * * * ." 765 ILCS 1025/18 (West 2004). Under the 2004 version of the Act, amounts in that trust fund in excess of $2.5 million were to be deposited in the State Pension Fund on dates certain twice annually. 765 ILCS 1025/18 (West 2004). Payment for claims allowed under the Act was to be paid out of the trust fund. 765 ILCS 1025/18 (West 2004).

BACKGROUND

The plaintiffs, David Cwik, successor independent administrator of the estate of Genowefa Bogdanowicz, and Anita White, filed a lawsuit against the defendants, Judy Barr Topinka,[1] Treasurer of the State of Illinois, and Alissa Camp,[2] director of the Unclaimed Property Division of the office of the Illinois Treasurer (collectively the Treasurer), on behalf of themselves and all others similarly situated, seeking payment of interest on their property – money in the case of each of the representative plaintiffs – held by the State of Illinois under the Act prior to their claims of reclamation. The plaintiffs also sought certification of the suit as a class action.

The circuit court denied the Treasurer's motion to dismiss the amended complaint, but certified two questions to the appellate court pursuant to Supreme Court Rule 308 (155 Ill.2d R. 308). Pursuant to Supreme Court Rule 306(a)(8) (210 Ill.2d R. 306(a)(8)), the Treasurer also sought review of the circuit court's order certifying the class. The appellate court granted review in both instances and consolidated the appeals.

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[1] Alexi Giannoulias succeeded Judy Barr Topinka as Treasurer.

[2] Joshua Joyce succeeded Alissa Camp as director of the Unclaimed Property Division.

The questions certified for review were stated as follows:

> "Whether the retention for state purposes of the interest earned on property held pursuant to the Illinois Uniform Disposition of Unclaimed Property Act during the time it was in the possession of the State Treasurer's Office and/or the State's Retirement Systems is a taking for which just compensation is due under the Fifth and Fourteenth Amendments to the United States Constitution or Article II, [*sic*] § 15, of the Illinois Constitution[.]
>
> If so, whether just compensation should be measured by the interest earned by the State on the property taken[.]"

In addressing the certified questions, the appellate court observed that the majority of courts in other jurisdictions, considering a property owner's entitlement to *interest* under virtually identical statutes, have relied upon the United States Supreme Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), in concluding that "the retention of earned interest by a state under an unclaimed property statute is not a 'taking' requiring the payment of compensation." 389 Ill.App.3d at 29, 328 Ill.Dec. 766, 905 N.E.2d 300. The appellate court noted that the circumstances in *Texaco* were distinguishable insofar as the property in that case was considered *abandoned* under the applicable statute, whereas this court, in *Canel v. Topinka*, 212 Ill.2d

311, 288 Ill.Dec. 623, 818 N.E.2d 311 (2004), adopted the view that, under Illinois' Disposition of Unclaimed Property Act, the state does not acquire title to the property in question, but merely holds the neglected property for the owner. 389 Ill.App.3d at 28, 328 Ill.Dec. 766, 905 N.E.2d 300, citing *Canel,* 212 Ill.2d at 331, 288 Ill.Dec. 623, 818 N.E.2d 311. Following a brief discussion of *Brown v. Legal Foundation,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) – a case initiated by *vigilant* property owners who sought the interest on their funds held in lawyers' trust accounts – the appellate court concluded the initial portion of its analysis with this ambivalent statement: "Thus, while the retention of interest [in the case at bar] *may* be a 'taking,' the question is whether the named plaintiffs here have lost anything of value." (Emphasis added.) 389 Ill.App.3d at 30-31, 328 Ill.Dec. 766, 905 N.E.2d 300.

In addressing that question, the appellate court observed: "Nowhere in the [plaintiffs'] allegations do the plaintiffs plead that their respective funds were earning interest at the time the State took custody of them. When questioned at oral argument, the attorneys for the parties acknowledged that they were unaware whether the plaintiffs' funds had been earning interest prior to the time they were placed in state custody." 389 Ill.App.3d at 31, 328 Ill.Dec. 766, 905 N.E.2d 300. Assuming there had been a "taking" for purposes of our state and federal constitutions, the appellate court found the dearth of said

allegations or claims dispositive on the question of just compensation:

> "Unlike the stock in *Canel,* which continued to produce dividends even though 'neglected' by the owner, there is no evidence that the plaintiffs' property in this case was producing any interest until the Treasurer took possession of it under the Act. While the State may have gained the interest income, the plaintiffs failed to plead that they were receiving interest or expected to receive interest on the funds remitted to the State under the Act. Simply put, the State's gain did not establish a loss on the part of the plaintiffs. As such, the plaintiffs have no claim for a taking for which compensation is due." 389 Ill.App.3d at 31-32, 328 Ill.Dec. 766, 905 N.E.2d 300.

Applying that rationale, the appellate court answered both questions "in the negative as they apply to this particular case." 389 Ill.App.3d at 32, 328 Ill.Dec. 766, 905 N.E.2d 300. The court concluded: "As we have determined that the named plaintiffs do not have a claim for a taking for which compensation is due, they have no cause of action and may not seek relief on behalf of the other class members. [Citation.] Therefore, the circuit court's order granting class certification is reversed, and the cause remanded for further proceedings consistent with the views expressed in this opinion." 389 Ill.App.3d at 32, 328 Ill.Dec. 766, 905 N.E.2d 300.

ANALYSIS

Plaintiffs raise numerous issues on appeal. We need address only one: "whether the defendants' retention of the interest accrued on unclaimed property pursuant to § 15 of the Act is an unconstitutional taking of private property without compensation."

Statutes are presumed constitutional, and we have the duty to construe statutes so as to uphold their constitutionality if there is any reasonable way to do so. *O'Brien v. White,* 219 Ill.2d 86, 98, 301 Ill.Dec. 154, 846 N.E.2d 116 (2006). The party challenging the validity of the statute has the burden of rebutting the presumption of constitutionality by clearly demonstrating a constitutional violation. *Napleton v. Village of Hinsdale,* 229 Ill.2d 296, 306, 322 Ill.Dec. 548, 891 N.E.2d 839 (2008). The constitutionality of a statute is a question of law that is reviewed *de novo. O'Brien,* 219 Ill.2d at 98, 301 Ill.Dec. 154, 846 N.E.2d 116.

We note at the outset that no interpretation of the statute itself is necessary. The language of the statute is plain; its meaning is clear. With two exceptions not applicable here (for "unliquidated stock and mutual funds"), the statute provides that the owner of property "paid or delivered to the State Treasurer" pursuant to the provisions of the Act "is not entitled to receive income" thereon. 765 ILCS 1025/15 (West 2004). Thus, the Act clearly divests the property owner of any right to interest earned on property held by the state pursuant to the authority

of the Act. The question before us is whether the legislature can, without running afoul of our state and federal constitutions, enact a statute that divests neglectful proper owners of interest earned on their property while it is committed to the custody of the state for safekeeping. Applying the precedent and reasoning of the Supreme Court in *Texaco,* we hold that it can.

At issue in *Texaco* was an Indiana statute that automatically divested the owner of a severed mineral interest of his or her right thereto – returning it to the surface owner – where the subsurface owner, for a period of 20 years, failed to use the interest or at least file a statement of claim with the local recorder of deeds. After examining its pertinent precedent, the Supreme Court rejected appellants' contention that the State of Indiana lacked "the power to provide that property rights of this character shall be extinguished if their owners do not take the affirmative action required by the State." Referring to that precedent, the Supreme Court noted:

> "In each case, the Court upheld the power of the State to condition retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." *Texaco,* 454 U.S. at 529, 102 S.Ct. at 792, 70 L.Ed.2d at 750-51.

Having established that the states may enact statutes resulting in the lapse or divestment of a neglectful owner's rights in property, the Court went on to hold that the state was not required to pay compensation to such an owner:

> "In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. * * * It is the owner's failure to make any use of the property – and not the action of the State – that causes the lapse of the property right; there is no 'taking' that requires compensation." *Texaco,* 454 U.S. at 529, 102 S.Ct. at 792-93, 70 L.Ed.2d at 751-52.

The Court went on to address appellants' due process concerns, observing, first, that appellants, like all other citizens, "may be presumed to have had knowledge of the terms" of the Indiana statute. *Texaco,* 454 U.S. at 533, 102 S.Ct. at 794, 70 L.Ed.2d at 753. See generally *People v. Lander,* 215 Ill.2d 577, 588, 294 Ill.Dec. 646, 831 N.E.2d 596 (2005) ("It is well settled that all citizens are charged with knowledge of the law"). The Court pointed out that it was "essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Texaco,* 454 U.S. at 533, 102 S.Ct. at 794, 70 L.Ed.2d at 753-54. In that respect, the Supreme Court rejected appellants' reliance upon the seminal due

process decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (establishing requirements of notice and an opportunity to present objections), concluding: "The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. * * * The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property." *Texaco,* 454 U.S. at 535, 102 S.Ct. at 795, 70 L.Ed.2d at 754.

We find the reasoning of *Texaco* dispositive in the matter before us, for if a state legislature can constitutionally enact a statute that divests a neglectful owner of *all* rights in certain property absent the performance of specified activities evincing a continued and possessory interest in the property over the prescribed statutory period, then it logically follows that the legislature can, constitutionally, take the *less* drastic measure of enacting a statute that operates to divest those owners of only certain incidents of ownership, without mandating divestiture of all rights in the property. That is what the Illinois legislature has done here. As in *Texaco,* "[i]t is the owner's failure to make any use of the property – and not the action of the State – that causes the lapse of the property right; there is no 'taking' that requires compensation." *Texaco,* 454 U.S. at 530, 102 S.Ct. at 792-93, 70 L.Ed.2d at 752. The fact that the Illinois legislature has taken a more benevolent attitude

toward those who neglect their property than it might have does not render its enactment unconstitutional.

While the circumstances here might not qualify as "abandonment" under a common law definition, there appears to be no question, under *Texaco,* that the state could enact *statutory* provisions mandating the status of abandonment in appropriate circumstances or declaring the property interest lapsed *in toto.* Instead, using the phrase "presumed abandoned" sparingly, more commonly simply "abandoned," the legislature has effectively declared only an incident of ownership lapsed – the right to income earned – and has set up a system that at least allows errant property owners a reasonable period of time in which to recover their tangible property, and an unlimited period in which to recover its monetary equivalent. Pursuant to this system – triggered at the outset by the owner's neglect rather than proactive state action aimed at seizing property from the vigilant – the Treasurer is to receive custody of the neglected property and then is required to assume, in apparent perpetuity, the responsibility of safekeeping the property, or the proceeds from the sale thereof, for any owners who may wish to reclaim their "abandoned" property. In return for this seemingly advantageous, long-term reclamation service, the state receives the benefit of retaining the interest earned from its management of the property after it is placed in state custody.

Quoting in part from the Seventh Circuit Court of Appeals' decision in *Commonwealth Edison Co. v.*

Vega, 174 F.3d 870, 872 (7th Cir.1999), this court, in *Canel,* described the state's role and attendant benefit under the Act as follows:

> "'[N]ot only does the state have free use of the property unless and until the owner reclaims it; the state is not required to (and Illinois does not) pay any interest to a reclaiming owner. [Citations.] In effect, the property is an interest-free loan to the state – in perpetuity if the owner never shows up to claim it.' *Vega,* 174 F.3d at 872.
>
> *See also* Note, *Virginia's Acquisition of Unclaimed and Abandoned Personal Property,* 27 Wm. & Mary L.Rev. 409, 419-20 (1986) (noting three dual policies of the uniform law including the protection of owners in order to reunite them with their property while providing adopting states with a method for raising revenue)." *Canel,* 212 Ill.2d at 325, 288 Ill.Dec. 623, 818 N.E.2d 311.

In *Canel,* we held that the state did not have the right to dividends issued on plaintiff's shares of unliquidated stock while the stock was in the possession of the state. We reached that result after a thorough examination of the unique features of corporate ownership:

> "The shares of a corporation are the units into which the proprietary interests in a corporation are divided. 805 ILCS 5/1.80 (West 2000). The proprietary interests represented

> by the shares of stock consist of management or control rights, rights to earnings, and rights to assets. *Stroh v. Blackhawk Holding Corp.,* 48 Ill.2d 471, 479 [272 N.E.2d 1] (1971); 11 Fletcher's Cyclopedia of Private Corporations § 5081 (rev. vol. 2003).
>
> Once a dividend is declared, it becomes a corporate debt owed to the shareholders in proportion to their shares in the corporation, and, if the corporation refuses to pay, the shareholders may sue to recover the unpaid dividend. 11 Fletcher's Cyclopedia of Private Corporations § 5322 (rev. vol. 2003). A lawfully declared dividend is the separate property of the shareholders, wholly disconnected from their shares. *Ford v. Ford Manufacturing Co.,* 222 Ill.App. 76, 83 (1921). Stated simply, a dividend belongs to the owner of the shares. In this case that owner remained, at all times, the plaintiff, James Canel." *Canel,* 212 Ill.2d at 323-24, 288 Ill.Dec. 623, 818 N.E.2d 311.

Given the attributes of stock ownership, and the circumstances of that case, we held that the dividends issued to Canel by the corporation while Canel's stock was in the custody of the state remained Canel's separate property and the state had no right to retain it. The retention thereof constituted a "taking" for which just compensation was due. We thus remanded the cause to the circuit court for a determination of just compensation. *Canel,* 212 Ill.2d at 331-32, 288 Ill.Dec. 623, 818 N.E.2d 311.

However, we repeatedly and pointedly limited our analysis and holding to the retention of *dividends* by the state:

> "Because this case involves dividends accruing on unliquidated stock, we confine our analysis of section 15 to only dividends earned on shares of unliquidated stock held by the state pursuant to the Act." *Canel,* 212 Ill.2d at 323, 288 Ill.Dec. 623, 818 N.E.2d 311.
>
> "We stress that our opinion today is limited only to dividends accruing on stock held by the state under the Act." *Canel,* 212 Ill.2d at 333, 288 Ill.Dec. 623, 818 N.E.2d 311.

As our quotation of *Vega* suggested (see *Canel,* 212 Ill.2d at 325, 288 Ill.Dec. 623, 818 N.E.2d 311), and our cautionary comments on the reach of the decision portended, we believe interest earned via state action on a corpus of money or other forms of property in the custody of the state can and should be treated differently from dividends automatically issued to the record holder of stock while the latter is in the state's possession prior to liquidation.

First, section 15 of the Act *specifies* different treatment for "income or other increments accruing * * * on unliquidated stock and mutual funds." 765 ILCS 1025/15 (West 2004). This legislative distinction recognizes – as did the limitation of our holding in *Canel* – the unique attributes and nature of those forms of corporate ownership and investment.

Second, as our analysis in *Canel* acknowledges, dividends are separate property issued *to* the owner of stock, *as* the owner, irrespective of any action on his or her part. While stocks are in the Treasurer's custody, prior to liquidation, stocks remain the property of their owners, and any dividends issued are issued to them as owners of record – automatically. No action is required of either the owner or the state. The same is not true of interest earned on sums of money coming into the Treasurer's possession pursuant to the provisions of the Act. Without state action, the corpus earns nothing. Thus, there is a reasoned basis for treating dividends and interest differently.

We reiterate, pursuant to the holding in *Texaco*, the Illinois legislature has the authority – without violating our state or federal constitutions – to declare property statutorily "abandoned" where the owners have failed to show interest in the property through the performance of specified acts over a prescribed period of time. By such a declaration, our statute – self-executing as in *Texaco* – divests the owner of only certain incidents of ownership – unlike the Indiana statute at issue in *Texaco* – while the state provides safekeeping of the corpus and reclamation services. Our statute effects what may be described as limited lapse or divestment. There is no taking that would require compensation.

We emphasize that this situation differs from those extant in cases cited by plaintiffs in that this property was not wrested from a vigilant and reluctant property owner, who was actively involved

with its oversight or management, and who disputed the appropriation at the time of the alleged taking.

We also note in passing plaintiffs' suggestion, in their reply brief, that application of the principles accepted in *Texaco* might result in a denial of due process in some case. Plaintiffs contend, "if the [third-party] holder is later determined to have turned the property over to the State by mistake" the Act "provides the owner with no mechanism to challenge the loss of his property right, nor does it require the State to prove the facts necessary to support the forfeiture." Plaintiffs do not argue that the third-party holders of *their* property turned it over to the state by mistake, or that the facts would not support limited lapse of *their* property rights under the statute. Those observations, considered in conjunction with the *Texaco* Court's approval of the "self-executing" feature of the Indiana statute there at issue, suggest to us that plaintiffs lack standing to make that type of challenge to the statute. See *People v. Funches,* 212 Ill.2d 334, 346, 288 Ill.Dec. 654, 818 N.E.2d 342 (2004) ("A party has standing to challenge the constitutionality of a statute only insofar as it adversely impacts his or her own rights"). Even if this were not the case, plaintiffs fail to address notification (765 ILCS 1025/12 (West 2004)), claims (765 ILCS 1025/19, 20 (West 2004)), and review (765 ILCS 1025/21 (West 2004)) provisions of the Act itself, and of the Code of Civil Procedure generally, to explain why those provisions are inadequate to provide procedural due process to those who fall within the purview of the Act. As our

appellate court has aptly observed, a court of review is entitled to have the issues on appeal clearly defined with pertinent authority cited and reasoned, cohesive legal argument. *First National Bank of LaGrange v. Lowrey,* 375 Ill.App.3d 181, 208, 313 Ill.Dec. 464, 872 N.E.2d 447 (2007). An issue not clearly defined and sufficiently presented fails to satisfy the requirements of Supreme Court Rule 341(h)(7) (210 Ill.2d R. 341(h)(7)).

For the foregoing reasons, given the facts of this case, we find that no "taking" occurred when the state retained interest earned on plaintiffs' property held in its custody pursuant to the provisions of the Act. In this respect, our holding is not entirely consistent with the analysis of the appellate court, which was ambivalent on that point. Nonetheless, we may affirm on any basis supported by the record (*People v. Durr,* 215 Ill.2d 283, 296, 294 Ill.Dec. 115, 830 N.E.2d 527 (2005)), and we agree with the result reached by the appellate court. Thus, the judgment of the appellate court is affirmed.

Affirmed.

Chief Justice *FITZGERALD* and Justices *FREEMAN*, *THOMAS*, *KILBRIDE*, *GARMAN*, and *BURKE* concurred in the judgment and opinion.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

DAVID CWIK, *et al*,	)	
Plaintiffs,	)	
v.	)	
ALEXI GIANNOULIAS, Treasurer of the State of Illinois, *et al.*,	)	No. 05 CH 9872
Defendants.	)	

ORDER

(Entered Sep. 21, 2007)

This cause coming to be heard on the Renewed Motion for Interlocutory Appeal, pursuant to Supreme Court Rule 308; filed by ALEXI GIANNOULIAS, Treasurer of the State of Illinois and JOSHUA JOYCE, Director of the Unclaimed Property Division of the State Treasurer's Office; due notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the motion is granted.

The Court finds that its Order of August 22, 2006, denying defendants' Motion to Dismiss plaintiffs' First Amended Complaint involves questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation;

The Court hereby identifies the following questions for appeal:

> Whether the retention for state purposes of the interest earned on property held pursuant to the Illinois Uniform Disposition of Unclaimed Property Act during the time it was in the possession of the State Treasurer's Office and/or the State's Retirement Systems is a taking for which just compensation is due under the Fifth and Fourteenth Amendments to the United States Constitution or Article II, §15, of the Illinois Constitution?
>
> If so, whether just compensation should be measured by the interest earned by the State on the property taken?

, 2007

ENTER:

Judge

Steven M. Puiszis
Michael J. Leech
Robert T. Shannon
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000
Firm I.D. No. 90384

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES H. CANEL, individually and on behalf of a class of all others similarly situated, Plaintiff, v. JUDY BAAR TOPINKA, Treasurer of the State of Illinois, and MITCHELL MURDOCK, Director, Unclaimed Property Division, Office of the Treasurer of the State of Illinois, Defendants.	No. 00 CH 13279 Judge Philip Bronstein
DAVID CWIK, as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz and on behalf of a class of all others similarly situated, and ANITA WHITE, individually and on behalf of a class of all others similarly situated, Plaintiffs,	No. 05 CH 9872 Judge Philip Bronstein

v.)
)
JUDY BAAR TOPINKA,)
Treasurer of the State of)
Illinois, and ALISSA CAMP,)
Director, Unclaimed)
Property Division, Office of)
the Treasurer of the State of)
Illinois,)
)
Defendants.)

ORDER

This matter coming on to be heard upon the Plaintiffs' Motion for Reconsideration of Class Certification in Case No. 05 CH 9879 (*Cwik*); due notice having been given, the Court having been fully advised in the premises, and the parties having been heard;

IT IS HEREBY ORDERED that Plaintiffs' Motion for Reconsideration of Class Certification is granted for the reasons set forth on the record in open court and a plaintiff class is certified pursuant to 735 ILCS 5/2-801, *et seq.*, the Class being defined as:

> All persons or entities whose property has been taken into custody by the State of Illinois pursuant to the Illinois Uniform Disposition of Unclaimed Property Act (or its predecessor acts) and which has earned or will earn interest or other accruals (other than dividends) while in the custody of the State, which interest or other accruals have been or will be used for the purposes of

funding state programs and operations without compensation being paid to the person or entity whose property was or will be used to earn such interest or accruals.

The Court finds that:

(1) The Class is so numerous that joinder of all members is impracticable, the Class consisting of tens of thousands of people and/or entities.

(2) There are questions of fact or law common to the Class, which common questions predominate over any questions affecting only individual Class members. The overridingly predominant question is whether the taking by the state of interest earned on unclaimed property is a taking in violation of the State and Federal Constitutions.

(3) The representative parties and their counsel will fairly and adequately protect the interests of the Class. Counsel are skilled in litigation of this complexity and no conflict of interest by the representative parties has been noted by the Court; and

(4) The class mechanism is an appropriate method for the fair and efficient adjudication of the controversy since separate suits by hundreds of thousands of

individuals put the burden on the judiciary and the possibility of inconsistent rulings augurs in favor of this class action.

ENTER:

_____

Judge, Circuit Court of
Cook County, Illinois

Dated: AUG 30, 2007

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

DAVID CWIK, as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz and on behalf of a class of all others similarly situated, and ANITA WHITE individually and on behalf of a class of all others similarly situated, Plaintiffs, v. JUDY BAAR TOPINKA, Treasurer of the State of Illinois, and ALISSA CAMP, Director, Unclaimed Property Division, Office of the Treasurer of the State of Illinois, Defendants.	No. 05CH09878 JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiffs David Cwik, as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz, and Anita White for their class action complaint against Defendants Judy Baar Topinka, Treasurer of the State of Illinois, and Alissa Camp, or her predecessor in office, Director of the Unclaimed Property Division of the Office of the Treasurer of the State of

Illinois (collectively "Defendants"), state and allege as follows:

INTRODUCTION

1. This is an action for violation of Article I, §15 of the Constitution of the State of Illinois, and the Fifth and Fourteenth Amendments to the United States Constitution, as well as under 42 U.S.C. § 1983, and concerns the Defendants' unlawful confiscation of dividends, interest and other accruals (collectively "earnings") earned on private property while it is held in custody for its owners by the State of Illinois pursuant to the Illinois Uniform Disposition of Unclaimed Property Act, 765 ILCS 1025/1 *et seq.* (the "Illinois Act" or "Act") Pursuant to the Act, private property in the possession of a person other than its owner and deemed presumptively "abandoned" under the Act must be remitted into the Defendants' custody, at which point the earnings on such private property are used to fund a variety of State programs and operations having no relation to the property or its earnings. The Defendants' failure to return the earnings thereon to the owner of the property is a taking of private property without just compensation in violation of the Constitutions of the State of Illinois and the United States. In this lawsuit, Plaintiffs seek on their own behalf and on behalf of the Class defined herein a declaration that the Act, in prohibiting the return of most earnings on private property held in custody by the State, and the Defendants' policy and practice of always retaining the dividends and

earnings, is unlawful. Plaintiffs also seek recovery of Plaintiffs' and the Class's private property wrongfully taken, together with injunctive relief to prevent further violations of the Plaintiffs' and the Class's constitutional rights and an accounting to determine the persons and/or entities to whom Defendants have failed to remit earnings along with the return of principal upon a valid claim.

2. Plaintiffs bring this action on their own behalf and on behalf of the following Class:

> All persons or entities whose property has been taken into custody by the State of Illinois pursuant to the Illinois Uniform Disposition of Unclaimed Property Act (or its predecessor acts) and which has earned or will earn interest, dividends or other accruals while in the custody of the State, which interest, dividends or other accruals have been or will be used for the purposes of funding state programs and operations, without compensation being paid to the person or entity whose property was or will be used to earn such interest, dividends or other accruals.

PARTIES

3. Plaintiff David L. Cwik is an individual and is and has at all times relevant been a resident of the State of Illinois. On November 29, 2004, Mr. Cwik was appointed as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz and

asserts this cause of action as the representative of that Estate.

4. Plaintiff Anita White is an individual and is and has at all times relevant been a resident of the State of Illinois.

5. Defendant Judy Baar Topinka is the Treasurer of the State of Illinois. In that position, since July 1, 1999 and pursuant to §.05 of the Act, 765 ILCS 1025/.05, Ms. Topinka has been and is charged with supervising and administering, and has supervised and administered, the Unclaimed Property Division of the Office of the Illinois Treasurer.

6. Defendant Alissa Camp is the Director of the Unclaimed Property Division of the Office of the Treasurer of the State of Illinois. In those positions, Ms. Camp was and is charged with administering, and has administered, the Unclaimed Property Division, including disposition of all property that is remitted to the Division and payment of all approved claims for return of such property.

FACTS

The Act and its Operation

7. In 1954, the National Conference of Commissioners of Uniform State Laws approved the original version of the Uniform Disposition of Unclaimed Property Act ("1954 Act"). The 1954 Act was revised in 1966.

8. Illinois adopted the 1954 Act in 1961. The Illinois Act was amended in 1975 to conform substantially to the 1966 revisions.

9. The Illinois Act provides that all tangible and intangible property held for its owner by another and deemed abandoned under the Act must be delivered to the Director of the Unclaimed Property Division of the Office of the Treasurer of the State of Illinois. The Act defines property as presumptively abandoned if it is in the custody of a third party, and has been unclaimed for a statutorily-prescribed period, five years for private holders and seven years for government holders.

10. The Act requires that all non-monetary presumptively abandoned property delivered to the State pursuant to the Act, with certain exceptions, "be sold within a reasonable time to the highest bidder." Pending liquidation, any earnings on the property, such as dividends on securities, are to be received by Defendants.

11. Section 1025/18 of the Act directs the State Treasurer to deposit all funds received pursuant to the Act, including funds from the liquidation of property, into the State Pension Fund, except that an amount not exceeding $2,500,000 is to be retained by the State Treasurer to ensure prompt payment of approved claims filed by the owners of abandoned property. In addition, the Treasurer is also authorized to deduct from such funds to be delivered:

a. any costs incurred in connection with the liquidation of abandoned property;

b. any costs of mailing and publication in connection with any abandoned property; and

c. any costs incurred in connection with the maintenance of records or disposition of claims made pursuant to the Act.

12. Pursuant to Section 105/8.12 of the State Finance Act, 30 ILCS 105/8.12, all monies held in the State Pension Fund are to be used for the administration of the Act and for partial payment of the State's required contributions to designated State employee retirement systems. Section 105/8.12 further provides that each year the General Assembly is to appropriate the balance in the State Pension Fund, minus $5 million, to the various State pension systems.

13. Property remitted to the Defendants and the State pursuant to the Act earns interest, dividends or other accruals, and/or is held in interest-bearing accounts or instruments, and such interest, dividends and other accruals is used by the State Pensions Fund and the Treasurer to fund their operations and programs.

14. Unlike an escheat statute, in which actual title to abandoned property may eventually vest in the State after certain procedures are followed, the Act is purely custodial in nature, and title to abandoned property is never transferred from the owner to the State of Illinois. Thus, title and ownership at all

times remain with the original owner of the property. As stated in the Prefatory Note to the Uniform Disposition of Unclaimed Property Act (Rev. 1966 Act), which, with amendment, was adopted by the State of Illinois and forms the basis of the current Act:

> The Uniform Act is custodial in nature – that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. . . . In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and title to the property passes to the state.

15. The Annual Reports of the Illinois Department of Financial Institutions ("IDFI"), which until July 1, 1999 was responsible for administration of the Act, similarly provide that a property owner is not stripped of his, her or its interest in the property when it is delivered to the State for custody. For example, the IDFI's 1998 Annual Report states:

> The Illinois unclaimed property statute is "custodial" in nature. This means that an owner or heir can always claim funds that were remitted to the Division. This differs from an "escheat state" in which, after a mandated period, funds remitted to the state become the state's property and can no longer be claimed by an individual. All unclaimed assets remitted to this state are

> held in perpetual custody until the rightful owner or their heirs claim them.

A similar statement appears in the IDFI's 1997 Annual Report.

16. At all times, prior to liquidation and after, property declared abandoned under the Act and held in custody by the State remained, and remains, the private property of its owner, and is not the property of the State. *See, Commonwealth Edison Co. v. Vega,* 174 F.3d 870 (7th Cir. 1999), *cert. denied,* 528 U.S. 873, 120 S. Ct. 176, 145 L.Ed 2d 149 (Act is not an escheat statute, and the State does not acquire title to the abandoned property but is merely custodian, and owner can reclaim property at any time).

17. In *Morton Grove Park District v. American National Bank and Trust Company*, 78 Ill.2d 353, 362, 399 N.E.2d 1295, 1299, 35 Ill.Dec. 767, 771 (1980) ("*Morton Grove*"), the Illinois Supreme Court defined "property":

> The word "property" as employed in the taking clause of the Federal and Illinois constitutions includes every interest anyone may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy and dispose of the same.

A copy of the *Morton Grove* opinion is attached hereto as Exhibit A.

18. The Illinois Supreme Court has recognized the general rule that "interest follows principal," holding in *Morton Grove,* 78 Ill.2d at 362-63, 399 N.E.2d at 1299, 35 Ill.Dec. at 771, that:

> The earnings on the funds deposited are a mere incident of ownership of the fund itself The "taking clause" provision [of the United States and Illinois Constitutions] applies to the earnings in the same manner, and with the same force, as it applies to the principal.

19. In *Morton Grove*, the Illinois Supreme Court held that money awarded to an owner of real property in a condemnation proceeding while the money is in possession of the county treasurer pending resolution of a property owner's appeal, is itself private property, and "[t]he use of the award money by the county treasurer, to earn interest which is not paid to the owner but to the county, is clearly a taking of private property for public use." *Id.*, 78 Ill.2d at 362, 399 N.E.2d at 1299, 35 Ill.Dec. at 771.

20. As a result, the Illinois Supreme Court held:

> In our case the money that was deposited with the county treasurer belonged to the condemnees and at no time did the county have a legitimate claim to it or any interest in it.
>
> [¶] We hold that [the property owners] are entitled to be reimbursed for the full amount of money which has been earned on the sum deposited with the county treasurer

> pursuant to the order of the Circuit Court of Cook County.

Id., 78 Ill.2d at 365, 399 N.E.2d at 1300, 35 Ill.Dec. at 772.

21. The United States Supreme Court has also held that retention of interest earned on private funds held by a government agency is a taking in violation of the Fifth Amendment to the United States Constitution. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162, 66 L.Ed.2d 358, 367 101 S.Ct. 446, 451 (1980) ("*Webb's*"), the United States Supreme Court, finding unconstitutional a Florida statute which allowed a county clerk to retain interest earned on interpleader funds, stated:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

In *Webb's*, the Supreme Court held that all interest earned on the interpleader funds belonged not to the government but to the owners of the funds, and must be returned to them. A copy of the *Webb's* opinion is attached hereto as Exhibit B.

22. In keeping with the fact that abandoned property remains the private property of the owner, the Act provides that an owner of property remitted

to the State as custodian under the Act can make a claim at any time, and upon approval, and after deducting an amount to cover the cost of notice publication and related clerical expenses, the State Treasurer is to "make payment forthwith" to the property's owner. *See,* 765 ILCS 1025/20(b).

23. Despite the custodial nature of the Act, however, the Act provides that except for income on certain securities, the return of which is discretionary, a property owner will not be given the income earned on their private property when it is returned. Instead, the Act provides that the State may retain all interest, dividends and other accruals earned on abandoned property during the period it is held by the State. Section 15 of the Act provides:

> When property is paid or delivered to the State Treasurer [formerly the Director] under this Act, the owner is not entitled to receive income or other increments accruing thereafter, except that income accruing on unliquidated stock and mutual funds after July 1, 1993 may be paid to the owner.

24. The Treasurer, and previously the Director, has final authority under the Act to decide whether or not to return "income or other increments accruing" on stocks or mutual funds held pursuant to the Act. Although discretionary under the Act, on information and belief, it is the policy and practice of the Treasurer, as was the Director's, not to return to the property owner any income or other increments which have accrued after July 1, 1993 on securities

held in custody pursuant to the Act, and, upon information and belief, in no case has such income or other increments ever been returned to the owner. Conversations with Rick Blockyou of the Office of the State Treasurer of Illinois by plaintiff and counsel for plaintiff form the basis of the allegations in this paragraph.

25. By authorizing the State to retain earnings and other accruals on abandoned property, and authorizing the Director to decide not to return "income on unliquidated stock and mutual funds," and by the Director not remitting them to persons claiming formerly unclaimed property as alleged previously, the State and the Defendants have unlawfully appropriated to the State both the interest and other accruals on such private property, as well as any income on the property for the period during which such property is held.

26. The net result of these practices is that: (a) certain income received on the property pending liquidation, such as dividends or other accruals, and (b) any interest or other income received on funds is taken for State use without compensation.

27. According to the IDFI's 1998 Annual Report, during fiscal year 1998, which ended on June 30, 1998, remittance of abandoned property to the State totaled over $123 million, owned by more than 300,000 property owners, and claims in the amount of approximately $27 million were paid to 22,822 claimants. Since 1961 through June 30, 1998, over

$909 million has been remitted, and over $179 million in property has been returned to 161,896 owners. Currently, the State holds custody to more than $800 million in principal amount of unclaimed property plus the interest and earnings on it.

Plaintiffs' Property

28. In 1993, Atlantic Richfield Company delivered $280.50 in past dividends and shares of stock (later sold for $1,430.04) to the Treasurer as unclaimed property. Originally owned by Bert Golden, as of the transfer date this property belonged to Anita (Golden) White, as the sole heir to Bert Golden, who died intestate in 1988. While Defendants held Ms. White's property in custody, it accrued earnings.

29. On or about November 16, 2004, pursuant to a valid claim submitted, the Unclaimed Property Division of the Treasurer's Office returned the sum of $1,710.54 to Anita White. That amount represented only the principal sum that had been deposited with Defendants as unclaimed property and did not include any of the interest or other earnings that had accrued on that principal amount while Defendants held it in custody pursuant to the Act.

30. In or about December 1995, money belonging to the Estate of Genowefa Bogdanowicz was deposited with the Treasurer as unclaimed property. While Defendants held the estate's property in custody, it accrued earnings.

31. On June 26, 2000, pursuant to a claim submitted, the Unclaimed Property Division of the Treasurer's Office returned the sum of $45,555.11 to the Administrator of the Estate of Genowefa Bogdanowicz. That amount represented only the principal sum that had been deposited with Defendants as unclaimed property and did not include any of the interest or other earnings that had accrued on that principal amount while Defendants held it in custody pursuant to the Act.

CLASS ACTION ALLEGATIONS

32. Plaintiffs bring this action as a class action pursuant to §2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, on behalf of the Class.

33. Plaintiffs are unable to determine the exact number of individuals and entities which comprise the Class since this information is solely within the possession and control of the defendant. However, as noted above, currently more than 300,000 persons or entities own private property deemed abandoned and held in custody by the State of Illinois under the Act. More than 22,000 claims were paid in fiscal 1998 alone, and more than 161,000 claims have been paid since the inception of the Act. Based upon the sums currently held by the State pursuant to the Act, $800 million, and the number of persons or entities whose property is currently held by the State, the average amount of each claim is approximately $2,700 and the earnings on each such claim will be smaller still.

Therefore, most, if not all Class members, have claims that are too small to warrant an individual action. Thus, the Class is sufficiently numerous to make joinder of all Class members impossible.

34. Common questions of law or fact exist, and include but are not limited to, the following:

a. whether interest, dividends and other accruals earned on property held in custody by the Defendants is private property;

b. whether §15 of the Act, and the Defendants' policy and/or practice of retaining dividends, interest and other accruals earned on private property while in Defendants' custody pursuant to the Act, violate Article I, §15 of the Illinois Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution; and

c. what constitutes a proper remedy for the taking of such private property.

Conversely, the only individual questions affecting Class members is the precise amount of each Class Member's private property wrongfully withheld by Defendants. Thus, these common questions predominate over any questions affecting only individual members.

35. Plaintiffs' claims are typical of those of other Class members in that their private property was remitted to the State of Illinois pursuant to the Act,

and upon return of their property they did not receive the earnings which had accrued on their property while in the possession of the State.

36. Plaintiffs and their counsel will fairly and adequately protect the interests of the Class. The interests of the Class representatives are consistent with those of the Class, and they have no interests antagonistic to the Class. Plaintiffs are represented by experienced and able counsel whose firms have successfully represented plaintiff classes in complex matters throughout the United States in both federal and state courts.

37. This class action is an appropriate method for the fair and efficient adjudication of the claims asserted herein. Repetitive individual litigation would pose an unnecessary burden on Class members and the court system. This class action is not expected to present any significant management difficulties and focuses, by definition, on the uniform and consistent actions of the Defendants. The prosecution of separate actions would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the Defendants.

COUNT I

(ON BEHALF OF PLAINTIFFS AND THE CLASS)

38. Plaintiffs reallege all preceding paragraphs as if fully set forth here.

39. Article I, §15 of the Constitution of the State of Illinois provides:

> private property shall not be taken or damaged for public use, without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

40. The interest, dividends and other accruals earned on private property owned by Plaintiffs and the Class while in the Defendants' custody pursuant to the Act is itself private property.

41. The Act and the Defendants' policy and practice of not returning dividends, interest and accruals provide a windfall to the State and place upon property owners whose private property has been taken into custody by the Defendants pursuant to the Act an unfair burden which in fairness and equity should be borne by all citizens of the State.

42. By retaining such accruals and using them for State purposes, Defendants have violated and continue to violate the prohibition against taking private property without payment of just compensation contained in Article I, §15 of the Illinois Constitution.

43. Defendants' unlawful use and retention of the earnings on Plaintiffs' and the Class's private property is a taking of such property without just compensation, and so a deprivation of the Plaintiffs' and the Class's rights secured under Article I, §15 Illinois Constitution.

COUNT II

(ON BEHALF OF PLAINTIFFS AND THE CLASS)

44. Plaintiffs reallege all preceding paragraphs as if fully set forth here.

45. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution, provides in relevant part: "private property [shall not] be taken for public use, without just compensation."

46. The interest, dividends and other accruals earned on private property owned by Plaintiffs and the Class while in the Defendants' custody pursuant to the Act is itself private property.

47. The Act and the Defendants' policy and practice of not returning dividends, interest and accruals provide a windfall to the State and place upon property owners whose private property has been taken into custody by the Defendants pursuant to the Act an unfair burden which in fairness and equity should be borne by all citizens of the State.

48. By retaining such accruals and using them for State purposes, Defendants have violated and continue to violate the Fifth and Fourteenth Amendments' prohibition against taking private property without payment of just compensation.

49. 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

50. At all times, in repeatedly, systematically and uniformly using and retaining Plaintiffs' and the Class's private property, Defendants acted under color of state law.

51. Defendants' unlawful use and retention of the earnings on Plaintiffs' and the Class's private property is a taking of such property without just compensation, and so a deprivation of the Plaintiffs' and the Class's rights secured under the Fifth and Fourteenth Amendments to the United States Constitution and a violation of 42 U.S.C. §1983.

WHEREFORE, Plaintiffs pray that the Court:

52. Determine that this action may be maintained as a class action pursuant to §2-801 of the

Illinois Code of Civil Procedure on behalf of the Class defined herein and declare Plaintiffs to be proper Class representatives and their counsel to be Class counsel;

53. Declare the retention of dividends, interest and other accruals on private property deemed presumptively abandoned and taken into custody by the State of Illinois pursuant to the Illinois Disposition of Unclaimed Property Act, 765 ILCS 1025/1 *et seq.*, to be an unconstitutional taking of private property without just compensation pursuant to Article I, §15 of the Constitution of the State of Illinois and the Fifth and Fourteenth Amendments to the United States Constitution and a violation of 42 U.S.C. §1983;

54. Find that Defendants' policy and practice in failing to return dividends, interest and other accruals to property held by the Defendants as custodian under the Illinois Uniform Disposition of Unclaimed Property Act is an unconstitutional taking of private property without just compensation under Article I, §15 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and a violation of 42 U.S.C. §1983;

55. Enter a temporary, preliminary and/or permanent order providing for appropriate equitable and injunctive relief to ensure the return of Plaintiffs' and the Class's private property and enjoining defendant from pursuing the illegal policies, acts and practices complained of herein and providing an

accounting that identifies all persons who submitted approved claims and whose property has been returned to them without payment of dividends, interest or other accruals earned on such property while in the State's possession;

56. Award Plaintiffs and the Class their reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1988;

57. Award counsel for Plaintiffs and the Class reasonable attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law;

58. Award such other and further relief as the Court deems just and proper.

DAVID CWIK, as Successor Independent Administrator of the Estate of Genowefa Bogdanowicz and on behalf of the Class, and ANITA WHITE, individually and on behalf of the Class,

By: /s/ John R. Wylie
One of the Attorneys for Plaintiffs

Arthur T. Susman
Charles R. Watkins
John R. Wylie
Matthew T. Heffner
Susman, Watkins & Wylie, LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603

Telephone: (312) 346-3466
Firm No. 35557

William J. Harte
William J. Harte Ltd.
111 W. Washington Street, Suite 1100
Chicago, Illinois 60602
Telephone: (312) 726-5015
Firm No. 04410

Dated: June 10, 2005

NAUPA
National Association of
Unclaimed Property Administrators®
Representing State Governments That Actively Find Owners While Protecting Forgotten Funds Until Claimed

What is Unclaimed Property

Fast Facts About Unclaimed Property

- Every U.S. state, District of Columbia, Puerto Rico, the U.S. Virgin Islands and Quebec, British Columbia and Alberta in Canada have unclaimed property programs that actively find owners of lost and forgotten assets.
- Unclaimed property laws have been around since at least the 1940s, but have become much broader and more enforced in the last 15 years. Unclaimed property is one of the original consumer protection programs.
- $1.754 billion returned to the rightful owners in Fiscal Year 2006 from 1.929 million accounts
- Total of at least $32.877 billion is currently being safeguarded by state treasurers and other agencies for 117 million accounts.

- Claims can be made into perpetuity in most cases -- even by heirs.

Billions of dollars have been lost. Could some of it be yours?

NAUPA is the association of the state unclaimed property programs, but the databases are located and maintained by each state, not NAUPA. However, most states participate in MissingMoney and we suggest that you search there. You may also link to all state databases individually from this Web site.

Answers to Questions about Unclaimed Property

What is unclaimed property?

Unclaimed property (sometimes referred to as abandoned) refers to accounts in financial institutions and companies that have had no activity generated or contact with the owner for one year or a longer period. Common forms of unclaimed property include savings or checking accounts, stocks, uncashed dividends or payroll checks, refunds, traveler's checks, trust distributions, unredeemed money orders or gift certificates (in some states), insurance payments or refunds and life insurance policies, annuities, certificates of deposit, customer overpayments, utility security deposits, mineral royalty payments, and contents of safe deposit boxes.

What happens to these accounts that have no activity?

Acting in the best interest of consumers, each state has enacted an unclaimed property statute that protects your funds from reverting back to the company if you have lost contact with them. These laws instruct companies to turn forgotten funds over to a state official who will then make a diligent effort to find you or your heirs. Most states hold lost funds until you are found, returning them to you at no cost or for a nominal handling fee upon filing a claim form and verification of your identity. Since it is impossible to store and maintain all of the contents that are turned over from safe deposit boxes, most states hold periodic auctions and hold the funds obtained from the sale of the items for the owner. Some states also sell stocks and bonds and return the proceeds to the owner in the same manner.

How do states try to return this money?

The state treasurers and other officials who administer the unclaimed property programs have developed many powerful and effective methods to locate owners including the use of websites, cross-checking public data, staging thousands of awareness events at state fairs and even shopping malls, and developing a national database, MissingMoney.com. The methods work as tens of millions of potential lost owners inquire annually resulting in this vital consumer

protection program returning money to people at a rate approaching two billion dollars annually.

How do I begin my free search?

Companies are required by law to send funds from lost accounts to the state of the owner's last known address. That means you could potentially have unclaimed property in every state that you have resided. You might want to begin your search on MissingMoney, a Web site officially endorsed by the National Association of Unclaimed Property Administrators (NAUPA) containing the official collective records from most state unclaimed property programs. NAUPA will link you to every state unclaimed property program Web site where you can search. Both sites are free.

If searching is free, why do I receive notices that there is a charge to search?

Several business firms have used the states' freedom of information acts to obtain owner information. These firms notify individuals that they will conduct a search for unclaimed property in their name for a fee. Many states do not even provide complete records to these firms to protect your privacy. The bottom line is that you may pay them to search if you wish, but all the information is accessible free of charge by searching the state databases or MissingMoney, or by contacting any state unclaimed property office.

I have received a notice that property has been found, but there is a fee to obtain it.

There are many businesses, sometimes called finders or locators, which find legitimate lost property for owners and offer to inform them of how to obtain it for a fee, usually a percentage of the total (some states limit the fee to 10 percent). Sometimes, companies will hire these firms to find you before they turn the funds over to the state. Ultimately the finder will ask you to sign a contract. The majority of firms that provide these services work within the law, but there are also many unclaimed property scams across the United States. Before signing any contract from a firm of this type, we recommend that you be cautious and contact the unclaimed property office in your state for more information.

How do I keep my property from becoming lost in the future?

Remember, property becomes lost due to a company having no communication with the owner. You should contact institutions that hold your money or property every year and especially when there is an address change or change in marital status. For security reasons, most financial institutions do not forward mail. Keep accurate financial records and record all insurance policies, bank account numbers with bank names and addresses, types of accounts, stock certificates, and rent and utility deposits.

- Cash all checks for dividends, wages, and insurance settlements without delay.
- Respond to requests for confirmation of account balances and stockholder proxies.
- If you have a safe deposit box, record its number, bank name and address, and give the extra key to a trusted person.
- Finally, prepare and file a will detailing the disposition of your assets.

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